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IN THE

Supreme Court of the United States

October Term, 1956

No. 333

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 552

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF.

In opposition to the petition for a writ of certiorari herein, respondents contend that the "constitutional question" was not seasonably raised; that the question was not necessary to a determination of the case; that if it was so necessary, the question was not substantial; and that no "state action" is involved. The position of petitioners is directly to the contrary.

I.

The Federal Question Was Seasonably Raised and Pursued on Appeal Through All the State Courts.

(a) The *only* property right which the complaint pleaded and with respect to which it requested relief was petitioners' right to pursue a calling. (Pet. pp. 4-7.) That the trial court had before it and considered whether a deprivation of *such a right* violated the Fourteenth

Amendment is apparent from its decision. The trial court stated: "Plaintiffs contend that the alleged agreement among these defendants prevent plaintiffs from pursuing their several callings in the motion picture industry." (Pet. App. p. 25.) The court held, contrary to respondents' contention, that petitioners had the standing to invoke this claim. (Pet. App. p. 22.) It held, however, that the respondents as a matter of law had been justified in their conduct. It stated that "exemption from self-incrimination is not a part of due process of law or a privilege or immunity of national citizenship." (Pet, App. p. 24.) The court stated that it had frequently been contended "that some state action or authorized procedure impaired the protection against self-incrimination afforded by the fifth Amendment to the Constitution" (Pet. App. p. 24), but it held that this court has consistently ruled that the Fifth Amendment is "restrictive only of national action." (Pet. App. p. 24.)

(b) Thus, the lower court, by its ruling, initially sanctioned the conduct of respondents and denied petitioners all remedy for the injury done them.

As respondents concede, in California practice, questions are raised on appeal in the briefs of the parties. (Resp. Br. p. 1, n. 1.)* Petitioners, following their appeals to the District Court of Appeal from the judgments of the Superior Court, filed their *Opening Brief.*

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*Petitioners do not object, of course, to the filing of the supplemental record, and indeed welcome the inclusion of all the briefs on appeal. We had assumed that such briefs are not ordinarily a part of the record filed with the court. (Stern & Gressman, *Supreme Court Practice* (1954), p. 90), and that the pleading, the decisions of the courts below, together with the petitions for rehearing, and hearing in the Supreme Court, amply established that the federal question was always raised and necessarily determined.

After the statement of the Case, as this Court will observe, the Argument commences with the claim that the judgments of dismissal "deprived appellants of their liberties and properties without due process of law in violation of the due process provisions of the California Constitution, Article I, Section 13, and the Fourteenth Amendment to the United States Constitution." (Op. Br. p. 7.) We do not presume to summarize the entire argument in the Opening Brief, but on page 18, the discussion commences as follows: "By any scale of values, it cannot be denied that the right to earn a living ranks high in our constitutional system. (Cal. Const., Art. I, Secs. 1; 13; U. S. Const., Amend. 14.)" Then follows citations and quotations from decisions of this court in *Yick Wo v. Hopkins*, 118 U. S. 356; *Cummings v. Missouri*, 4 Wall. (U. S.) 277; *Allgeyer v. Louisiana*, 165 U. S. 578; *Truax v. Raich*, 239 U. S. 33; *Meyer v. Nebraska*, 262 U. S. 390; *Pierce v. Society of Sisters*, 268 U. S. 510; *Takahashi v. Fish. Comm'n.*, 334 U. S. 410.

The claim of deprivation of federal right in violation of the Constitution runs throughout the Opening Brief. On pages 23-24 of the Opening Brief, it is urged that the monopolistic combine arrogated governmental powers denied even to officials of government, with appropriate citations of decisions of this court. From pages 24-27, argument is devoted to establishing that the lower court was in error in asserting that the issue of due process was not involved in the case. "But it has never been held in California nor in the federal jurisdiction that a lawless invasion of the privilege against self-incrimination could never offend the fundamental requirements of due process nor deprive persons of those fundamental rights

secured to citizens by state and federal constitutions." (Op. Br. p. 27.) Then follows discussions of the governing federal statute (18 U. S. C., Sec. 241), (Op. Br. pp. 28-9), the recent decisions of this court on the privilege against self-incrimination (pp. 30-32), and discussions of the methods and objects of the monopolistic combine in the light of this court's decisions (pp. 34-41). There is a quotation from *Truax v. Corrigan*, 257 U. S. 312: "A State may not withdraw all protection against 'a wrongful and highly injurious invasion of property right.'" (Op. Br. p. 41.) It is added that "the denial of all relief to appellants constituted for all practical purposes the sanctioning of arbitrary lawlessness by State action in disregard of fundamental rights of liberty and property, all resulting in the deprivation of due process of law" (citing *Truax v. Corrigan, supra*) (Op. Br. p. 42). Protest is made at the "immunity granted to respondents by the court below" without trial (Op. Br. p. 21). In the light of all this, it is difficult to see how respondents can reasonably urge that the federal question was not seasonably raised below.

Respondents filed their answering brief. They urged, despite the ruling of the court below, that petitioners had not pleaded any existing contract or prospect of one, and therefore had no legally protected interest. They contended in any event that the complaint showed on its face that they were justified in all that they admittedly did. But on the issue here, we cull only one quotation from the lengthy brief: "A point is made by appellants of a constitutional 'right to work' and of the impairment of that right by the action of respondents. (Op. Br. pp. 18-21.) The cases cited in support are, with two exceptions to which we shall come in a moment, all concerned

with the constitutionality, under the Fifth and Fourteenth Amendments, of *government* action affecting one's opportunity to work. These amendments are a limitation on the power of government but not individuals." (Resp. Br. p. 62.) The whole of respondents' brief makes clear this recognition that the federal question was raised, briefed and argued before the District Court of Appeal.

Petitioners filed a reply brief. All the argument and citations of the Opening Brief were, of course, not repeated. Nevertheless, petitioners pointed out from the outset that respondents' argument on "lack of standing" basically misconceived the constitutional question in the case. Petitioners urged again and again that the suit was not for breach of a specific contract, or inducement of its breach, but "total exclusion from a chosen calling." (Reply Br. p. 22) To all that was stated in the Opening Brief, there were added additional quotations from the text writers (Reply Br. pp. 16-17) and citations from decisions of this court. (Reply Br. pp. 20-24.) The thread runs throughout the Reply Brief: "Respondents do not deny that the right to earn a living is a liberty protected by the Constitution. (App. Br. pp. 18-21.)" (Reply Br. p. 37.) See also, pages 38, 40, 41, 44, 58, 59, 60, 61, 62, 64, 65. The reply brief concludes with the following statement: "The judgments of the court below deprived appellants of their liberty and property without due process of law and the equal protection of the laws under both the state and federal Constitutions." (Reply Br. p. 68.)

(c) We do not understand the respondents to deny that the same federal question was duly raised in the petition for rehearing following the decision of the District Court of Appeal and in the petition for hearing to the

Supreme Court of California. [R. 175-188, 189-246.] It is submitted, therefore, that the federal claim and the grounds therefor were seasonably brought to the state courts' attention with precision. And "if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67.

II.

The Federal Question Was Necessary to a Determination of the Case.

The question, which the respondents urge was not "seasonably raised," is not the federal question here. Respondents are referring to the specific ruling of the District Court of Appeal which respondents contend makes it inappropriate for this court to consider the actual federal question involved. In the petition for the writ of certiorari, we have endeavored to establish that the federal question covered the whole case, and that the rights of petitioners could not finally be determined without deciding the federal question; that the holding of the state court necessarily denied petitioners' claims under the Constitution; that the grounds of the denial were so interwoven with the federal question as not to be an independent matter or sufficiently broad to sustain the judgments without any decision of the federal question. (Pet. pp. 13-17.)

Petitioners also asserted that the specific grounds of the state court decision were invalid because in themselves they denied petitioners the equal protection of the laws and deprived them of liberty and property without due process of law under the Fourteenth Amendment.

(Pet. pp. 17-19.) Obivously a "non-federal ground" is inadequate if it is itself destructive of constitutional rights. This additional argument was addressed to this court solely to establish that jurisdiction is properly rested in this court to consider the federal question which was seasonably raised and constantly pursued in the state courts, and which the state courts necessarily decided in denying relief to petitioners.*

It cannot be denied that petitioners, whether they have a specific contract of employment or not, or a prospect of one, are now excluded permanently from employment in the motion picture industry.** If it is a violation of the Fourteenth Amendment for a State to deny any remedy for such concerted deprivation of the right to work, it is no less a violation because the state in denying all relief bases its denial solely on the failure to plead a specific contract.

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*Even if the federal question were limited to petitioners' obligation to plead and prove a specific contract, the issue had been met in the briefs before the District Court of Appeal, as we have shown above. Moreover, the only decision relied on by the District Court of Appeal and by respondents, even now, is *Campbell v. Rayburn*, 129 Cal. App. 2d 232, patently distinguishable from the issue here and not accepted by the trial court. The ruling of the District Court of Appeal accepting respondents' contention, was therefore a surprise and unexpected, and the constitutional attack on the ruling would therefore be timely in any event. *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U. S. 673. But that limited ruling was not the federal question here. It was merely an inextricable part of the federal question which went to the whole of the case, and by its ruling the state court necessarily denied petitioners' federal claim.

**We discuss *infra* the arbitrary nature of the distinction between a "reasonable prospect of a contract", held to be entitled to protection, and the right to pursue callings by individuals who have had from five to twenty-five years experience in their professions and who have acquired reputations for excellence of work and high esteem in the industry, held entitled to no protection.

Of course, if respondents had not combined as they did; if petitioners had been permitted to negotiate unfettered with individual employers in the industry, then the existence of a specific contract or the prospect of one would have been significant in any claim of deprivation of the right to work. But when respondents draw a cordon around the industry and refuse petitioners the right to enter and negotiate for work admittedly because petitioners exercised a federal right, no specific contract or prospect of one can ever be shown. Thus, the denial by the state here of any remedy upon the specific ground of absence of contract necessarily decided that petitioners had no right to work in the industry at all and that the irremedial conditions set by the monopoly were properly imposed.

It is submitted, for all the aforesaid reasons, that the jurisdiction of this court to consider the claims of petitioners is clear. There is no doubt that the federal question was necessarily decided by the state courts below.

III.

The Federal Question Is Substantial.

We do not repeat the substantive arguments presented in the petition for writ of certiorari (Pet. pp. 22-33), most of which respondents have chosen to ignore. Petitioners submit that in fact respondents' abstract argument emphasizes the importance of the federal question.

(a) Respondents contend that this case involved a local matter on which the state is free to adopt any "socio-economic" policy it pleases free from all legal restrictions; that the state is free to make an unfettered choice between competing social and economic policies. (Br. pp. 11-16.)

The Constitution of the United States, however, sets limits upon the exercise of state powers. A state cannot adopt a policy of abridging peaceful picketing. *American Federation of Labor v. Swing*, 312 U. S. 321. It cannot deny the assistance of counsel in all criminal cases. *Powell v. Alabama*, 287 U. S. 45. It cannot sanction the denial of freedom of speech in a company town. *Marsh v. Alabama*, 326 U. S. 501. It cannot even adopt a policy of compelling children to engage in flag salute exercises. *West Va. State Board of Education v. Barnette*, 319 U. S. 624. The question in this case is whether, consistent with the equal protection and due process provisions of the Fourteenth Amendment, a state may deprive persons of their constitutional right to work solely because they exercised a privilege secured by the Fifth Amendment to the Constitution; whether all remedies can be denied by the state against a monopolistic combine which, by concerted agreement and unlawful methods, excludes persons from their chosen callings solely because of their exercise of a federal constitutional right. None of the cases cited by respondents deal with the deprivation of the constitutional right to work under the circumstances presented here.

(b) Respondents argue that there is here no denial of equal protection of the laws, that the classification is "based upon legitimate differences between the classes." Insofar as the respondents contend that it is reasonable to differentiate between those who are employed and those who seek to become employed, we have endeavored to show that so far as the constitutional right to work is concerned, there is no rational basis for such classification. (Pet. pp. 14-15, 17-19.)

But that is not the essential vice here. It is not denied that the state affords legal and equitable remedies for deprivation of the right to work. See, *James v. Marinship Corp.*, 25 C. 2d 721, 155 P. 2d 329; *Bautista v. Jones*, 25 C. 2d 746, 155 P. 2d 343. What has been done here is to carve out a class of persons in the state who are denied all remedies for deprivation of the freedom to work solely because such persons exercised a constitutional privilege in a federal forum. Such a classification is arbitrary and capricious because it cuts off the most fundamental freedom of all freedoms merely because of the exercise of another freedom guaranteed by the Constitution of the United States—without proof of wrongdoing or any other incapacity.

(c) Respondents state: "The right to work is not the right to work for any specific employer." (Br. p. 18.) This may be conceded. But that is not the issue here. It is the admitted monopolistic combine which has made it imposisble to seek work from any specific employer. The state here has refused, by its denial of all relief, to unlock the combination which is the essential evil. (Pet. p. 23.)

(d) Respondents state (Br. p. 19) that the privilege of the Fifth Amendment is secure against "encroachments by the states or even by the Federal government." It argues, however, that it is not secure against "private reactions", "social disfavor" or "economic disadvantage". That is not the issue here. A private employer may arguendo refuse to employ a person who has claimed the privilege of the Fifth Amendment, or may refuse employment for any reason. But here the state has sanctioned the agreement of the monopolistic combine and the deprivation of all right to pursue a calling because of the

exercise of a constitutional privilege. Here the monopoly has not given the private parties the opportunity to negotiate freely. "Private reactions" have not been tested, and the "economic disadvantage" comes not from the exercise of the constitutional privilege, but from the conduct of the monopoly sanctioned by the state.

IV.

The Denial by the State of All Relief From an Unlawful Deprivation of the Right to Work in the Instant Case Denied Petitioners the Equal Protection of the Laws and Deprived Them of Their Liberty and Property Without Due Process of Law Contrary to the Applicable Provisions of the Fourteenth Amendment.

The action of state courts and judicial officers in their official capacities is action of the state within the meaning of the Fourteenth Amendment. *Brinkerhoff-Faris Co. v. Hill,* 281 U. S. 673.*

In a variety of situations, this court held that a denial of equal protection of the laws by leaving a class of suitors remediless for highly injurious and wrongful injuries was action by the State, whether ultimately such action was or was not upheld by this court. The Fourteenth Amendment was at least intended that persons should have like access to the courts of the country for the protection of their person and property and the prevention and redress of wrongs. *Truax v. Corrigan,* 257 U. S. 312; *Truax v. Raich,* 239 U. S. 33; *Meyer v. Nebraska,* 262 U. S. 390.

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*Respondents concede this, for they state: "We assume, when its constitutionality is called in question, that a rule or doctrine enunciated by a state court stands on the same footing as an act of the legislature." (Br. p. 13, n. 11.)

Here, the state has affirmatively created arbitrary, capricious and wholly irrational classifications. Persons who have a specific contract of employment are protected in their right to pursue a calling; those who have no such contract are totally without remedy, although the deprivation of the constitutional right to work by the wrongdoer is the same in each case. More than this: even if a person has only a reasonable prospect of a contract of employment, he is protected in his constitutional right, but if he is twenty-five years in the industry and has an excellent reputation and won high esteem (Pet. p. 4), such person is without all relief when seeking to pursue his chosen calling. Yet, a "reasonable prospect of a contract" may never eventuate into one, while a person with years of background and experience may more readily obtain a contract if he is permitted to follow his chosen calling. The line drawn by the state here is simply irrational.

Moreover, the courts of a state can act only "in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and . . . a purely arbitrary or capricious exercise of that power, whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all remedy, is wholly at variance with those principles". *Truax v. Corrigan*, 257 U. S. 312, 329. The state here has sanctioned the exercise by the monopolistic combine, a non-governmental organization, of powers forbidden to Government itself. (Pet. p. 26.) It has sanctioned the exercise by the monopoly of these powers by wrongful methods and for unconstitutional ends. It has left without remedy persons deprived of their fundamental right to work by such admitted wrongdoer. Such action

by the state draws the due process provisions of the Fourteenth Amendment into play. See *Marsh v. Alabama*, 326 U. S. 501; *Terry v. Adams*, 345 U. S. 461.

Conclusion.

The jurisdiction of this court is properly invoked. The federal question is substantial and should be decided by this court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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